

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROLAND M. STEWART,

Plaintiff,

v.

CAROLYN W. COLVIN, Commissioner of
Social Security,

Defendant.

Case No. C14-1882-RBL-BAT

**REPORT AND
RECOMMENDATION**

Plaintiff Roland M. Stewart seeks review of the denial of his Supplemental Security Income application. He contends the ALJ erred by (1) finding that he had not rebutted the presumption of continuing non-disability, (2) discounting his credibility, (3) assessing medical opinions, and (4) assessing his residual functional capacity ("RFC"). Dkt. 11 at 1-2. As discussed below, the Court recommends the case be **REVERSED** and **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

BACKGROUND

Mr. Stewart is currently 52 years old, has a GED and some college education, and has worked as a cook, general laborer, hotel houseman, and janitor.¹ He applied for benefits in

¹ Tr. 32, 193.

January 2007, and after a denial initially and upon reconsideration, he had a hearing with an ALJ, who denied benefits. Tr. 55-65. His request for review was denied by the Appeals Council, and he did not seek judicial review of the ALJ's decision. Tr. 96-99.

In May 2011, Mr. Stewart protectively applied for benefits again, alleging disability as of January 1, 2005.² Tr. 160-69. His application was denied initially and on reconsideration. Tr. 102-05, 111-18. The ALJ conducted a hearing on March 4, 2013 (Tr. 27-51), and subsequently found Mr. Stewart not disabled, noting that he had not shown a change in circumstances since his previous denial. Tr. 16-23. As the Appeals Council denied Mr. Stewart's request for review, the ALJ's decision is the Commissioner's final decision. Tr. 1-4.

THE ALJ'S DECISION

Utilizing the five-step disability evaluation process,³ the ALJ found:

Step one: Mr. Stewart had not engaged in substantial gainful activity since his alleged onset date.

Step two: Mr. Stewart's depression, anxiety, antisocial personality disorder, and substance abuse in reported remission were severe.

Step three: These impairments did not meet or equal the requirements of a listed impairment.⁴

RFC: Mr. Stewart can perform a full range of work at all exertional levels, but is limited to unskilled work. He can make judgments on simple work-related decisions and respond appropriately to supervisors and co-workers. He can tolerate occasional changes in the work environment, and cannot work with the public.

Step four: Mr. Stewart can perform his past work as a kitchen helper, and is therefore not disabled.

Tr. 16-23.

² At the second administrative hearing, Mr. Stewart amended his alleged onset date to May 10, 2011. Tr. 30.

³ 20 C.F.R. §§ 404.1520, 416.920.

⁴ 20 C.F.R. Part 404, Subpart P. Appendix 1.

DISCUSSION

1. Continuing Presumption of Non-Disability

A presumption of continuing non-disability applies in cases where a claimant was previously found not disabled, and has not demonstrated changed circumstances since the time of the prior decision. *See Chavez v. Bowen*, 844 F.2d 691, 693 (9th Cir. 1988). In this case, the ALJ noted that one of Mr. Stewart's severe impairments was previously substance abuse, and that this condition was now in reported remission. Tr. 16, 18, 58. The ALJ did not explain why the reported remission of a substance abuse disorder did not constitute a changed circumstance in Mr. Stewart's medical condition, and the Commissioner does not explicitly defend the ALJ's finding that the presumption was not rebutted. *See* Dkt. 15 at 16-17 (arguing that any error in this regard was harmless).

However, the court agrees with the Commissioner that the error is harmless, because the ALJ did not rely on the *Chavez* presumption to find Mr. Stewart not disabled based solely on *res judicata* principles.

2. Mr. Stewart's Credibility

The ALJ provided a number of reasons to discount Mr. Stewart's credibility, including (1) his long criminal history related to acts of dishonesty; (2) his inconsistent reporting to providers; (3) the fact that one examiner suggested that a malingering test should be performed because Mr. Stewart's presentation seemed "somewhat practiced"; (4) his poor work history, suggesting a lack of motivation to work; and (5) his ability to undertake some college education, despite allegations of mental impairments. Tr. 21-22. The Court will discuss each reason, and Mr. Stewart's challenge thereto, to determine whether the ALJ's adverse credibility determination is supported by clear and convincing reasons, supported by substantial evidence.

1 *See Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014).

2 **A. Criminal History**

3 Mr. Stewart argues that his criminal history is not a valid credibility factor “without more
4 justification.” Dkt. 11 at 11. Mr. Stewart is mistaken. *See Hardisty v. Astrue*, 592 F.3d 1072,
5 1079-80 (9th Cir. 2010) (ALJ’s adverse credibility finding was substantially justified because all
6 of the inferences upon which it rested, including inferences regarding prior convictions, had
7 substance in the record); *Albidrez v. Astrue*, 504 F.Supp.2d 814, 822 (C.D. Cal. 2007) (finding
8 consideration of crimes involving moral turpitude, such as showing a false ID to a peace officer,
9 as well as violent crime of attempted robbery, properly considered as basis for adverse credibility
10 determination).

11 The ALJ described Mr. Stewart’s long history of committing crimes of dishonesty,
12 including theft, burglary, and violating a domestic violence no-contact order. Tr. 21. The ALJ’s
13 findings regarding Mr. Stewart’s criminal history constitutes an “ordinary technique” of
14 credibility evaluation that supports the adverse credibility determination. *See Smolen v. Chater*,
15 80 F.3d 1273, 1284 (9th Cir. 1996).

16 **B. Inconsistent Statements**

17 Mr. Stewart argues that the ALJ did not provide an example of his inconsistent reporting,
18 despite finding that inconsistencies in his testimony undermined his credibility. The ALJ stated
19 that Mr. Stewart

20 told an examiner on August 29, 2011, that he was incarcerated from December
21 2008 until April 2011 ([Tr. 285]). Yet, when seen by a psychologist in September
22 2012, [he] said his most recent arrest was three or four years ago. He said he had
23 been convicted of four felonies and incarcerated for five years ([Tr. 300]).

Tr. 21. Mr. Stewart argues that the ALJ did not identify an inconsistency, because he could have
been arrested four years before September 2012 and been incarcerated on that charge starting in

1 December 2008. Dkt. 11 at 11. The Commissioner points out that the other information (four
2 felony convictions and five years of incarceration) was not accurate, because the record showed
3 that he had spent most of his adult life incarcerated. Dkt. 15 at 5 (citing Tr. 242). But the
4 evidence the Commissioner cites indicates that Mr. Stewart was “incarcerated *on and off* most of
5 his adult life[,]” that he was in prison for the second time in 2006, and that he had been arrested
6 approximately 30 times as an adult. Tr. 242 (emphasis added), 253, 286. These facts are not
7 necessarily inconsistent with a report of four felony convictions, and a sum of five years
8 incarcerated. Accordingly, this reason is not supported by substantial evidence.

9 **C. Malingering**

10 Mr. Stewart argues that the ALJ erred in relying on one provider’s suspicion of
11 malingering, when a subsequent malingering test revealed no evidence of malingering. *See* Tr.
12 303. Mr. Stewart has cited no authority indicating that evidence of no malingering on one
13 occasion negates suspicion of malingering on another, and the Court is aware of no such
14 authority. The provider’s suspicion of malingering is a clear and convincing reason to discount
15 Mr. Stewart’s credibility.

16 **D. Work History**

17 The ALJ found that Mr. Stewart’s poor work history made him conclude that Mr.
18 Stewart’s “motivation for returning to work and supporting himself is at best not clear. Most of
19 his adult life he has depended on public funds or incarceration to provide his basic necessities,
20 rather than earnings from jobs.” Tr. 22. Mr. Stewart argues that the ALJ impermissibly
21 speculated that he lacks motivation to work, but such an inference is reasonable from the facts
22 cited by the ALJ. *See Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002) (ALJ properly
23 considered “‘extremely poor work history’” and showing of “‘little propensity to work in

1 [claimant's] lifetime"" as negatively affecting her credibility as to inability to work; noting
2 claimant's "work history was spotty, at best, with years of unemployment between jobs, even
3 before she claimed disability"); *Albidrez*, 504 F. Supp.2d at 821-22 ("An ALJ may properly
4 consider a claimant's poor or nonexistent work history in making a negative credibility
5 determination.").

6 **E. College**

7 The ALJ found that Mr. Stewart's ability to complete college coursework undermined his
8 allegations of mental limitations, and he also noted that Mr. Stewart inconsistently reported the
9 amount of college education he received. Tr. 21.

10 Mr. Stewart disputes whether the purportedly inconsistent statements were actually
11 inconsistent. Dkt. 11 at 11-12. Even assuming that argument has merit, Mr. Stewart does not
12 challenge the ALJ's finding that his ability to complete college coursework at all is inconsistent
13 with his alleged mental limitations. The ALJ reasonably found that Mr. Stewart's ability to
14 complete college coursework is inconsistent with his alleged concentration and cognitive
15 difficulties. *See* Tr. 44 (hearing testimony regarding problems concentrating and thinking).

16 Although some of the ALJ's credibility findings are not supported by substantial
17 evidence, most of the reasons are legally sufficient and adequately supported, and not negated by
18 the ALJ's inclusion of erroneous reasons. Accordingly, any errors in the ALJ's credibility
19 findings are harmless. *See Carmickle v. Comm'r of Social Sec. Admin.*, 533 F.3d 1155, 1162-63
20 (9th Cir. 2008).

21 **3. Medical Opinions**

22 Mr. Stewart challenges the ALJ's assessment of various medical opinions, arguing that
23 (1) the ALJ's reasons to discount the opinions of Robert Parker, Ph.D., and Mary Montgomery,

1 ARNP, are not specific and legitimate⁵; and (2) the ALJ purported to credit opinions indicating
 2 that Mr. Stewart was more socially limited than provided in the RFC assessment. For the
 3 reasons explained herein, the Court finds that some of Mr. Stewart's arguments have merit.

4 **A. Dr. Parker's Opinion**

5 Dr. Parker examined Mr. Stewart in September 2012, and opined that he had several
 6 moderate, marked, and severe functional limitations. Tr. 299-313. The ALJ discounted Dr.
 7 Parker's opinion on the grounds that Mr. Stewart's self-reported activities are inconsistent with
 8 the limitations indicated by the psychologist. Tr. 22. Specifically, the ALJ found that Mr.
 9 Stewart's ability to participate in treatment sessions twice weekly, regularly visit the library to
 10 check out materials, and belief that he can get a job are inconsistent with Dr. Parker's opinion.
 11 Tr. 22 (citing Tr. 299, 300).

12 Mr. Stewart argues that (1) it is not clear how the activities cited contradict Dr. Parker's
 13 opinion; and (2) Dr. Parker noted those activities himself, so his opinion cannot contradict them.
 14 Dkt. 11 at 5-6. The Court agrees with the first argument. The ALJ did not explain how the
 15 activities cited contradict Dr. Parker's opinion, and no such contradiction is immediately
 16 apparent. A finding that a provider's opinion is internally inconsistent can be a legitimate reason
 17 to discount it — contrary to Mr. Stewart's argument — but in this case, the ALJ did not explain
 18 how or why the opinion was internally inconsistent. *See Bayliss v. Barnhart*, 427 F.3d 1211,
 19 1216 (9th Cir. 2005) (holding that an ALJ's rejection of a physician's opinion due to discrepancy

20 ⁵ The Commissioner offers a post hoc rationale as to why the opinions of Dr. Parker and Ms.
 21 Montgomery were not reliable. Dkt. 15 at 16. Although the Commissioner contends that the
 22 ALJ was entitled to discount their opinions due to reliance on non-credible self-reporting, the
 23 ALJ did not state this as a reason to discount either opinion. Tr. 22. Because the court may not
 affirm the ALJ on grounds not articulated by the ALJ, the court declines the Commissioner's
 invitation to consider post hoc rationales. *See Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir.
 2001) (declining to "affirm the decision of an agency on a ground that the agency did not invoke
 in making its decision").

1 or contradiction between opinion and the physician's own notes or observations is "a permissible
2 determination within the ALJ's province"). Accordingly, the ALJ shall reconsider the opinion
3 on remand, and either credit it or provide specific, legitimate reasons to discount it.

4 **B. Ms. Montgomery's Opinion**

5 Mr. Stewart's treating nurse, Ms. Montgomery, completed a DSHS form opinion in
6 October 2011, indicating that Mr. Stewart had some marked and severe functional limitations.
7 Tr. 293-98. The ALJ gave "some weight" to Ms. Montgomery's opinion, and stated that the
8 RFC assessment limiting Mr. Stewart to simple, routine tasks without interaction with the
9 general public was consistent with Ms. Montgomery's examination findings. Tr. 22.

10 The ALJ did not provide any reasons why he gave only "some weight" to Ms.
11 Montgomery's opinion, and this failure is error, because the RFC assessment is not entirely
12 consistent with Ms. Montgomery's opinion. She indicated that Mr. Stewart had marked
13 limitations in the ability to maintain appropriate behavior in a work setting, explaining that he
14 has "difficulty managing interpersonal interactions and coping with stress." Tr. 296. The ALJ
15 did not mention this portion of Ms. Montgomery's opinion, and thus did not provide any reason
16 to discount it. The RFC assessment indicates that Mr. Stewart can "respond appropriately to
17 supervisors and co-workers[.]" but this is inconsistent with Ms. Montgomery's opinion that he
18 would have "difficulty managing interpersonal interactions[.]" Tr. 20, 296. On remand, the ALJ
19 shall reassess Ms. Montgomery's opinion and either credit all of it, or provide specific,
20 legitimate reasons to discount it.

21 **C. RFC Assessment**

22 A State agency consultant opined that Mr. Stewart was "[c]apable of work w[ith]
23 [limited] social interaction, best away [from] [general public]." Tr. 80, 92. The ALJ purported

1 to give “significant weight” to this opinion (Tr. 19), yet found Mr. Stewart capable of responding
2 appropriately to supervisors and co-workers (Tr. 20). The ALJ did not explain why a restriction
3 on public interaction would account for all of the social limitations indicated by the State agency
4 consultant.

5 Furthermore, although the ALJ stated that an opinion provided by examining
6 psychologist Lou Sowers, Ph.D., supported his RFC assessment (Tr. 22), Dr. Sowers opined that
7 Mr. Stewart “experiences great difficulty working with others. He performs best in solitary jobs
8 wher[e] he can work alone such [as] a graveyard shift janitorial position.” Tr. 242. Again, the
9 ALJ does not explain how his RFC assessment, which does not limit Mr. Stewart’s interaction
10 with co-workers and supervisors, is consistent with Dr. Sowers’ opinion. The State agency
11 consultant relied upon Dr. Sowers’ opinion in rendering his own opinion. Tr. 90, 92.

12 The Commissioner argues that the ALJ was entitled to discount Dr. Sowers’ opinion as
13 based on non-credible self-reporting (Dkt. 15 at 14), but the ALJ did not provide this rationale.
14 Instead, the ALJ explicitly stated that his RFC assessment was consistent with Dr. Sowers’
15 opinion. Tr. 22.

16 Accordingly, on remand, the ALJ shall reconsider the State agency opinions as well as
17 Dr. Sowers’ opinion, in assessing Mr. Stewart’s social limitations.

18 CONCLUSION

19 For the foregoing reasons, the Court recommends that the Commissioner’s decision be
20 **REVERSED** and the case be **REMANDED** for further administrative proceedings under
21 sentence four of 42 U.S.C. § 405(g).

22 On remand, the ALJ should reconsider the opinions of Drs. Parker and Sowers, Ms.
23 Montgomery, and the State agency psychological consultants, in assessing Mr. Stewart’s RFC.

1 A proposed order accompanies this Report and Recommendation. Any objection to this
2 Report and Recommendation must be filed and served no later than **November 18, 2015**. If no
3 objections are filed, the Clerk shall note the matter for November 20, 2015, as ready for the
4 Court's consideration. If objections are filed, any response is due within 14 days after being
5 served with the objections. A party filing an objection must note the matter for the Court's
6 consideration 14 days from the date the objection is filed and served. Objections and responses
7 shall not exceed ten pages. The failure to timely object may affect the right to appeal.

8 DATED this 4th day of November, 2015.

9
10 
11 _____
12 BRIAN A. TSUCHIDA
13 United States Magistrate Judge
14
15
16
17
18
19
20
21
22
23